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THE PRESENT LEGAL STATUS OF THE PRIVATE SEAL
IN WEST VIRGINIA

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Introduction

For many years there has been much discussion of both the
legal effect of the private seal in West Virginia and of the desir-
ability of its further use. In fact more than thirty years ago an
editorial in The Bar,\(^1\) official publication of the West Virginia Bar
Association, observed that "it is not unusual to hear the casual
suggestion made that the private seal as used in this state has
ceded to be of any value. It is a mere relic of antiquity which
has outlived its usefulness. Worse than that, it occasionally makes
unnecessary trouble without any corresponding advantage."

If this statement had any significance at the time of its pub-
lication, it certainly is all the more pertinent today, in view of the
intervening statutory changes. It has been reasoned, for example,
that, since the need for a seal has been dispensed with by statute
in "any instrument conveying or agreeing to convey land, or any
interest whatever in land,"\(^2\) (the most formal and solemn instru-
ments known to the law), then, a fortiori, the seal should have no
legal effect whatever if attached to some type of document for
which the law has less solicitude. And while this attempt at logic
may run afloat of the time honored principle that "statutes in
derogation of the common law should be strictly construed,"\(^3\)
nevertheless, there are those who believe that the private seal has
no more legal significance in West Virginia today than it has in
those states where the seal has been abolished by statute.\(^4\)

In view of this apparent confusion, and also of the fact that
the Supreme Court of Appeals has stamped the sealing of writ-

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\(^1\) (1898) 5 THE BAR 146.
\(^3\) Most courts will not enlarge by construction the terms of a statute that
741, 100 S. E. 738 (1919); Bank of Weston v. Thomas, 75 W. Va. 321, 83
S. E. 985 (1914); Harrison, Adm'r v. Leach, 4 W. Va. 383 (1870).
\(^4\) As, for example, in Ohio or Kentucky. Ohio Gen. Code (Page, 1931)
§ 32; KY. STAT. (Carroll, 1930) § 471.
ten instruments as a "senseless custom"; the time seems appropriate for an investigation of statute and case law in order to determine, if possible, first, just what is the legal effect of the private seal in West Virginia today, and, second, what need for the private seal, if any, still exists in the state. In this connection four topics will be discussed: (1) the formal requisites of the seal; (2) the legal effect of the seal upon agreements to convey land and instruments actually conveying an interest in land; (3) the legal effect of the seal upon writings purporting to make gifts of personal property and upon other contracts; (4) the problem of consideration in sealed instruments.

**Formal Requisites of the Seal**

Lord Coke described the seal as used in his day to be wax upon which an impression had been made, and the wax without the impression was no seal. The reason for using a piece of wax in order to identify the maker of the instrument to which it was attached is, of course, elementary learning to any student of legal history. In mediaeval England only a few persons except the clergy were able to write and consequently the impression left by the signet ring of the covenanter (on which was engraved his coat of arms) was a convenient means of determining his identity. Then, too, the making of a sealed instrument was deemed to be a most solemn occasion. There was a certain ritualistic significance attached to the act of impressing the signet ring in the soft wax. Consequently — long before any legal sanction was given to a

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6 Williams, J. in Pardee v. Johnston, 70 W. Va. 347, 351, 74 S. E. 731 (1912): "The custom of sealing written instruments originated at a time when few men could write, and when they used stamps to make impressions upon wax, technically called a seal, instead of writing their names, and, notwithstanding the reason for the custom no longer exists, the law continues the senseless custom."

7 Coke, Inst. 169. "Sigillum est cera impressa, quia cera sine impressione non est sigillum."

*This paper has not attempted to make an exhaustive study of the history of sealed instruments. The following source materials are of interest in this connection: 5 Wigmore, Evidence (1932) § 2426; 1 Williston, Contracts (1900) c. VII; 3 Holdsworth, History of English Law (3d ed. 1923) 417 et seq.; Ames, Lectures on Legal History (1913) 98-99; Corbin, Cases on Contracts (3d ed. 1933) c. 3; Costigan, Cases on the Law of Contracts (2d ed. 1933) c. 1; Crane, The Magic of the Private Seal (1915) 15 Col. L Rev. 24, reprinted in Selected Readings on the Law of Contracts (1931) 598; Reeve, The Uniform Written Obligations Act (1928) 76 U. of Pa. L. Rev. 530, reprinted in Selected Readings on the Law of Contracts (1931) 614; Backus, The Origin and Use of Private Seals Under the Common Law, (1917) 51 Am. L. Rev. 369; Decker, The Case of the Sealed Instrument in Illinois (1917) 1 Ill. L. Bull. 65, 138.
simple promise — the common law enforced promises, or covenants, in writings "signed, sealed, and delivered."

However, as time passed, the requirement of the wax gradually was relaxed and a "wafer" or some "other tenacious substance" upon which an impression might be made eventually came to be recognized as a valid seal.\(^8\) The impression, however, apparently was still essential and the fact that an impression had been made was required to be determined by inspection.\(^9\)

It was at this period in the history of the seal that the American state courts divided on the question of what may constitute a valid seal. One line of authority limited strictly the departure from "the impression on wax" to the aforementioned wafer — "the seal should be a common-law seal, or, at least, by analogy, a seal impressed upon paper, or a paper affixed as a seal."\(^10\) Accordingly, we find language in the decisions, such as that employed by Chancellor Kent in Warren v. Lynch,\(^11\) denying validity as seals to scrolls or scrawls:

"A scrawl with a pen is not a seal, and deserves no notice. The law has not, indeed, declared of what precise materials the wax shall consist; and whether it be a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression, is perhaps not material. But the scrawl has no one property of a seal... To adopt it as such

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\(^{11}\) "Anciently a seal was defined to be an impression on wax; but it has long been held, that a seal by a wafer, or other tenacious substance, upon which an impression is or may be made, is a valid seal; and such is the seal objected to, upon which an impression not only may be, but was, actually made." Wilde, J., in Tasker v. Bartlett, 5 Cush. (Mass.) 390, 394 (1850).

\(^{10}\) "In process of time, other materials than wax were used, but the impression seems still to have been considered as important, and its existence was still to be tried by inspection." Tucker, J. in Cromwell v. Tate's Exec. 7 Leigh (Va.) 301, 304 (1836).

\(^{12}\) Providence Telegram Publishing Co. v. Crahan Engraving Co., 24 R. I. 175, 176, 177, 53 Atl. 804 (1902) (written word "seal" within scrolls hold no seal); McLaughlin v. Randall, 66 Me. 226, 227 (1877); Bishop v. Globe Co., 135 Mass. 132 (1883) (the word "seal" written or printed between brackets held insufficient); Beardsley v. Knight, 4 Vt. 471 (1832) (written word "seal" held insufficient). The form of corporate seals also was restricted. In Bates v. New York Central R. Co., 10 Allen (Mass.) 251 (1865) the court held insufficient in law a facsimile of the seal of a corporation printed upon a blank form at the same time that the remainder of the blank was printed. But in Royal Bank of Liverpool v. Grand Junction R. R. & Depot Co., 100 Mass. 444 (1868) the indented impression of a corporate seal on a bond was held to be a valid seal in law.

\(^{13}\) See Pillow v. Roberts, 13 How. (U. S.) 472, 14 L. Ed. 228 (1851) in which the Supreme Court held that the indented impression of a public seal made on paper by a machine was a valid seal.

\(^{14}\) 5 Johns. (N. Y.) 238, 245 (1810). Similar language appears in 4 Kent's Commentaries, 452, 453. For the subsequent history of the seal in New York, see Crane up. cit. supra n. 7.
would be at once to abolish the immemorial distinction between writings sealed and writings not sealed. Forms will frequently, and especially when they are consecrated by time and usage, become substance. The calling a paper a deed will not make it one, if it want the requisite formalities”.

The other group of states, which included Virginia, went much further in giving legal validity as seals to such written and printed devices as the word SEAL appearing after the name of the co-venantor, to the letters L. S. (locus sigilli), to various other kinds of scrolls and even to scrawls. The limit of informality probably was reached in Hacker's Appeal, a Pennsylvania decision which held that a dash one eighth of an inch long constituted a valid seal when preceded by a testimonium clause.

Mention has been made of the liberality of the Supreme Court of Appeals of Virginia in giving legal sanction as seals to written or printed scrolls. The Virginia Code of 1849 provided:

“Any writing to which the person making it shall affix a scroll by way of seal, shall be of the same force as if it were actually sealed.”

This same section was included in the Virginia Code of 1860, but was omitted from the West Virginia Code of 1868. Draftsmen of the latter code substituted the following provision:

“When the seal of a natural person is required to a paper, he may affix thereto a scroll by way of seal, or adopt as his seal any scroll, written, printed or engraved, made thereon by another.”

This section has remained in the statute law of West Virginia until the present time. It was retained as part of Section 6 of Chapter 2, Article 2 of the Revised Code of 1931.

There are several West Virginia decisions which consider the question of what constitutes a sufficient seal within the meaning of

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22 Jones & Temple v. Logwood, 1 Wash. (Va.) 43, 44 (1791) ("Scrolls have long since been substituted for seals in this country"); Hastings v. Vaughn, 5 Cal. 315 (1855) (the word "seal" written after the name of the grantor of a deed); Williams v. Greer, 12 Ga. 459 (1852) (ink scrolls with the word "seal" written within); Long v. Ramsay, 1 S. & R. (Pa.) 71 (1814) (a flourish made by a pen after the signature); Eames v. Preston, 20 Ill. 389 (a pair of brackets without any words or letters to identify the purpose).
23 121 Pa. 102, 15 Atl. 500 (1888).
24 C. 143, § 2.
25 C. 143, § 2.
26 C. 13, § 16.
27 See Keller's Adm'r v. McHuffman, 15 W. Va. 64, 77 (1879).
PRIVATE SEAL IN WEST VIRGINIA

the statute. In *Howkinberry v. Metz,*\(^{18}\) for example, the instrument sued on purported to be a deed of conveyance with covenants of general warranty. The deed concluded with the words "witness the following signature and seal." Then came the name of the grantor followed by five hyphens. The court, in holding the instrument properly sealed under provisions of the Code, observed in the course of its opinion: \(^{19}\)

"This provision would seem to allow the grantor to adopt almost any kind of a scroll or mark, written or printed, as his seal."

The same tendency to construe the statute broadly was observed in *Pardee v. Johnston.*\(^{20}\) In that case a grantor concluded his deed by stating that he had "hereunto set his hand and seal." He then signed his name and placed below his signature a scroll made by his pen. The deed was held to be properly sealed.\(^{21}\)

In considering the formal requisites of the seal two further matters should be noticed. The first concerns the question as to whether a recitation in the instrument that it is sealed is required to make the writing a valid specialty. The several states have not been in accord on this point. New York, for example, has held that such a recitation is necessary regardless of the type of seal used.\(^{22}\) Missouri required the recitation in the case of a scroll or scrawl\(^{23}\) but not in the case of a common law seal.\(^{24}\)

\(^{18}\) 91 W. Va. 637, 114 S. E. 240 (1922).

\(^{19}\) *Ibid* at 639.

\(^{20}\) 70 W. Va. 347, 74 S. E. 721 (1912).

\(^{21}\) "One of the definitions of the word 'scroll' given in Webster's Dictionary is a 'flourish, tracing, mark or design used in place of a seal,'" said the court, per Williams, J., *ibid* at 351.

However, a declaration in the body of an instrument to the effect that it is sealed is not enough in the absence of any mark whatever after the signature. Comley v. Ford, 65 W. Va. 429, 435, 64 S. E. 447 (1909).

In *Thomas v. Linn,* 40 W. Va. 122, 127, 20 S. E. 878 (1894) the court said: "The instrument in this case set up by plaintiff is a bond, or, more properly, a single bill, being under seal — having a scroll affixed thereto by way of a seal which is recognized as such in the body of the instrument . . . . It is a specialty, and therefore non-negotiable by our decisions."

Other decisions which consider the question of what form a seal may take in West Virginia are Miller v. Holt, 47 W. Va. 7, 10, 24 S. E. 956 (1890); Cosner v. McCrum, 40 W. Va. 339, 346, 21 S. E. 739 (1895); Keller v. Mc- Huffman, 15 W. Va. 64, 69, 85 (1879); Norvell v. Walker, 9 W. Va. 447, 450 (1876).


\(^{23}\) *Alt v. Stoker,* 127 Mo. 466, 30 S. W. 132 (1895); *Walker v. Keile,* 8 Mo. 301 (1843); *Grimsley v. Administrators of Riley,* 5 Mo. 280 (1837); *Cart- mill v. Hopkins,* 2 Mo. 220 (1830).

\(^{24}\) *Dingee v. Kearney,* 2 Mo. App. 515, 525 (1876).
took the view that the recitation was unnecessary. Upon first reading, the Virginia cases, which form the foundation of West Virginia law on the point, appear to be in utter confusion. If any rationalization of them is possible, it probably is this. If the instrument under consideration was of a type required by law to be sealed (a deed, for example), no acknowledgment or recitation of the seal in the body of the instrument was necessary. But, if the instrument was of a kind not required by law to be sealed (a contract for the sale of chattels, for example), then the maker would have to acknowledge the seal in the body of the instrument in order to give legal validity to the sealing.

The West Virginia Supreme Court of Appeals has recognized the foregoing Virginia classification. In *Cosner v. McCrum* the court, per English, J., makes the following observation:

"... and while it is true that our statute ... provides that "when the seal of a natural person is required to a paper, he

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25 Trasher v. Everhart, 3 G. & J. (Md.) 234, 246 (1831). Contracts Restatement (Am. L. Inst. 1932) § 100 provides: "A recital of the sealing or of the delivery of a written promise is not essential to its validity as a sealed contract."

26 Parks v. Hewlett, 9 Leigh (Va.) 511 (1838). The case involved an instrument of emancipation for certain slaves which could be effected only by a deed. The instrument had been recorded. The court said at 517: "It could not have been legally admitted to record as an instrument of emancipation, unless the witnesses swore that it was sealed, as well as acknowledged and delivered, in their presence. These circumstances amount at least to prima facie evidence that the instrument was duly sealed, and greatly outweigh the single presumption arising from the fact that no notice is taken of it in the body of the writing." Accord: Ashwell v. Ayres, 4 Gratt. (Va.) 283 (1848). This decision concerned an instrument to convey land which had a scroll attached to the grantor's signature. "The scroll was not recognized as a seal either in the body of the instrument or in the attestation clause, but the paper had been acknowledged in court by the grantor as his deed and admitted to record. It was held that such acknowledgment was a sufficient recognition of the scroll as a seal to make the instrument a deed." See also, II MINOR, INSTITUTE, 825 (4th ed. 1891).

27 Clegg v. Lemessurier, 16 Gratt. (Va.) 108 (1859), reviewing previous Virginia cases. See also note to Clegg v. Lemessurier. In Buckner v. Mackey, 2 Leigh (Va.) 488 (1831) a bond in printed form containing printed stamps or scrolls by way of seals, with a recital of sealing in the body of the instrument was held to be a specialty. But in Baird & Briggs v. Blaigrove, 1 Wash. (Va.) 170 (1793) an agreement of guaranty, with scrolls opposite each signature, but no recital of sealing, was held to be a simple contract. In Bradley Salt Co. v. Norfolk Importing and Exporting Co., 95 Va. 461, 28 S. E. 567 (1897) the Supreme Court of Appeals stretched the doctrine of Clegg v. Lemessurier to cover a case in which an actual seal of a corporation instead of a scroll was involved. The plaintiff sued in covenant on the writing. The defendant demurred to the declaration on the ground that the writing sued on was not a sealed instrument. A decision sustaining the demurrer was affirmed.


29 Ibid at 345, 346.
may affix thereto a scroll by way of seal or adopt as his seal any scroll, written, printed or engraved, made thereon by another;’ a distinction appears to exist between instruments which are not required to be acknowledged and recorded and those that are only to be signed and sealed. Where the latter do not recognize the scroll or seal in the body of the instrument, the weight of authority is that such papers are not sealed instruments. Where, however, a scroll is annexed to the signature of a paper purporting to be a deed, and the word ‘seal’ is written within the scroll, and said writing is properly acknowledged and admitted to record, it must be regarded as a deed, although the scroll or seal are not recognized in the body of the instrument.’

Accordingly, in Cosner v. McCrum a paper purporting to convey certain real estate as a gift from a husband to his wife was held to be a valid deed in equity, although the seal of the grantor was not recognized in the body of the instrument. The instrument, however, was duly acknowledged for record by the grantor.

The second and final question to be considered in this division of our study is whether the maker of an instrument may adopt as his own the seal of his co-maker. As already noted, the West Virginia statute provides that one may ‘adopt as his seal any scroll, written, printed or engraved, made thereon by another.’ The liberal views of the Supreme Court of Appeals on this point are contained in the following statement from the opinion in Pardee v. Johnston:

"It will be observed . . . that the statute does not require the scroll to have any particular form, or to be placed at any particular point with respect to the name of the party adopting it. A scroll appearing immediately after the name of one person may be adopted by another whose name may appear on the instrument below the first name."

Thus, in Norvell v. Walker the parties entered into a written agreement which concluded with the words, ‘witness the following signatures and seals.’ A scroll appeared after Walker’s

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Ibid.

 Accord: Smith v. Henning, 10 W. Va. 596, 632 (1877) (deed conveying land). See language in Comley v. Ford, supra n. 21. No West Virginia case squarely in point was found involving a sealed instrument where the seal had not been acknowledged in the body and where it was necessary to acknowledge and record the instrument in order to give it full legal validity. See Keller’s Adm’r v. McHuffman, supra n. 17 at 78.


 70 W. Va. 347, 351, 74 S. E. 721 (1912), per Williams, J.

 9 W. Va. 447 (1876).
name. Norvell's name was signed directly under Walker's, but no scroll followed it. It was held that the one scroll must be taken as the adopted seal of both parties to the agreement. However, in Keller's Adm'r v. McHuffman a promissory note concluded with the words "as witness my hand and seal the 1st day of March, 1862. Thomas McHuffman, (Seal)" and below appeared the name of the surety without a seal. The instrument was held to be a single bill obligatory as to the maker but only a promissory note as to the surety. The court apparently was not satisfied of any intention on the part of the surety to seal, in the absence of evidence to this effect either in the instrument itself or in the circumstances surrounding its making.

The Legal Effect of the Seal upon Agreements to Convey Land and Instruments Actually Conveying an Interest in Land

Although the term "deed" technically may describe any writing signed, sealed, and delivered, for purposes of this paper we shall confine its use to instruments conveying any interest in land, in freehold or inheritance, or for a term of more than five years. Furthermore, it will not be necessary to distinguish between the several kinds of conveyances that require deeds in West Virginia, nor to differentiate between deeds of lease and deeds of conveyance. The reason for this lumping together of various types of instruments relating to land will appear presently.

Before considering the West Virginia statutes affecting seals on instruments purporting to convey land, a word should be said concerning the common law rules of the Virginias in this connection. Clearly, prior to the statutory changes in 1921, a West Virginia deed without a seal was incapable of passing legal title to lands. This fundamental rule was thus stated long ago by Judge

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52 See Keller's Adm'r v. McHuffman, supra n. 17 at 86. Quaere, Whether the not in this case would not have been held to have been sealed by both maker and surety had the acknowledgment read "witness our hands and seals" instead of "witness my hand and seal"? "Whether it should be otherwise if the writing said 'witness our hands'. I do not now say anything as I conceive that question does not arise here," said the court.


54 W. Va. Rev. Code (1931) c. 36, art. 1, § 1, provides: "No estate of inheritance or freehold, or for a term of more than five years, in lands, or any other interest or term therein of any duration under which the whole or any part of the corpus of the estate may be taken, destroyed, or consumed, except for domestic use, shall be created or conveyed unless by deed or will."

Baldwin of the Supreme Court of Appeals of Virginia in Pollack & wife v. Glassell:29

"A seal is essential in the conveyance of the title to real estate — it excludes the bar of the statute of limitations — it is indispensable to bind the heirs of the party — it gives a priority in the administration of assets, and in various respects it effects the rules of evidence and the forms of action and pleading."

As noted previously, such clearly was the West Virginia rule also as far as the law side of the court was concerned. In equity the unsealed instrument was regarded as a contract to convey, on which specific performance would be decreed by ordering the grantor to execute a conveyance capable of passing legal title.28

Virginia and West Virginia leases also, when given for a period of more than five years, were required by statute to be by deed, thus placing such instruments under seal.29 This statutory provision ran counter to the common law rule in other jurisdictions, a rule which did not require a sealed instrument in order to create a valid term for years.30

In 1921 the West Virginia Legislature passed a statute which virtually cast into the discard all the learning of the Virginias with respect to seals on instruments involving real estate. This statute provided:4

"That the affixing of what has been known as a private seal, or scroll in lieu thereof, or the word 'seal' by any nat-

E. 1007 (1890) the court, per Brannon, J., said: "Suppose a deed for a fee were executed without a seal. It would not pass the legal estate; for our statute provides that no estate in land, greater than a term of five years, shall pass except by deed or will".28

25 2 Gratt. (Va.) 440, 453 (1846).

26 See n. 38 supra.42

42 Garten v. Layton, 76 W. Va. 63, 84 S. E. 1058 (1915); Atkinson v. Miller, supra n. 33, holding that "a paper made for a deed of trust conveying land to secure a debt, signed by the grantor but without a seal, though not effectual as a deed of trust at law, is an equitable mortgage enforceable in equity, and may be recorded ... and when recorded is a lien valid against subsequent purchasers and creditors." This case overruled Pratt & Fox v. Clemens, 4 W. Va. 443 (1871) and Shattuck v. Knight, 25 W. Va. 590, 601 (1885).

43 W. VA. REV. CODE (1931) c. 36, art. 1, § 1, this statute was carried through from the Virginia Codes of 1849 (c. 116, § 1) and 1860 (c. 116, § 1) and from the West Virginia Code of 1888. Comley v. Ford, 65 W. Va. 429, 64 S. E. 447 (1909) (instrument without seal purporting to assign an oil and gas lease for the term of twelve years, held to be no deed); Onyx & Marble Co. v. Miller, 74 W. Va. 636, 82 S. E. 1078 (1914).

44 Calkins v. Pierce, 112 Mo. 474, 22 Atl. 529 (1914); Hunt v. Hazelton, 5 N. H. 216 (1830).

45 Acts of 1921, c. 71, § 2.
ural person hereafter to any deed, trust deed, mortgage, lease, bond, or other writing, conveying, selling or agreeing to sell, leasing, renting or encumbering any real estate, shall not give thereto any additional force or effect; and the omission of any such seal, word or scroll, shall in no way detract from the legal effect of any such deed, trust deed, mortgage, lease, bond or other writing, and every estoppel, covenant and warranty contained therein or created thereby, shall be as binding, and may be applied and enforced, as if contained in or created by deed or other such writing under seal.”

The Revisers of the Official Code of 1931, in Chapter 36, Article 3, Section 1, simplified the foregoing section to read as follows:42

"The affixing of a seal, or any symbol or word intended to have the effect of a seal, shall not be necessary to give validity to any deed, trust deed, mortgage, or other conveyance of an estate of inheritance or freehold in land, or any estate of any duration therein."

The Revisers, in Section 3 of the same article, incorporated that part of the Act of 1921 which provided that the affixing of a seal to any instrument conveying or agreeing to convey land should have no legal effect whatsoever.43 And in Section 2 they provided that the action of covenant might be maintained on any written conveyance or lease which must be by deed."

42 W. VA. REV. CODE (1931) c. 36, art. 3, § 1. The Revisers' Note to this section reads: "Section 2, c. 71, Acts 1921 (§ 26, c. 72, Code, 1923), limited the effect of that act to natural persons, thus excluding corporations. Since the law is that a corporation 'may contract and be contracted with, by simple contract or specialty' (§ 3, art. 1, c. 31), it would seem that corporations and natural persons should be placed upon the same ground, with reference to their conveyances.

'Said § 2, Act of 1921, mentioned bonds and writings 'agreeing to sell', etc., real estate. Since such writings were not required, before the Acts of 1921, to be sealed, the inclusion of such writings in the act has caused some confusion, for example, by apparently broadening the scope of the action of covenant (See Acts 1931, c. 71, § 5, CODE 1922, c. 72, § 27) to include unsealed agreements to convey, and leases for less than five years, upon which the action of covenant could not have been maintained, before the Acts of 1921, if they had been unsealed. Such a result was probably not intended by the legislature, and is avoided by the revision.'

43 Section 3 reads: "The affixing of a seal, or any symbol or word intended to have the effect of a seal, to any instrument conveying or agreeing to convey land, or any interest whatever in land, shall not give to such instrument any additional force or effect, either by way of importing a consideration or in any other manner whatsoever, either at law, or in equity, than such instrument would have if it were unsealed'.

Section 2 reads: "An action of covenant may be maintained on any written conveyance or lease which, under the provision of section one, article one of this chapter, must be by deed, and which has been executed since the twenty-sixth day of July, nineteen hundred and twenty-one, for the breach
PRIVATE SEAL IN WEST VIRGINIA

Stated in summary fashion, the combined legal effect of these several sections of Chapter 36 is to dispense entirely with the necessity for a seal in the conveyance of any interest in land for a term of more than five years, whether by deed or by lease, and in contracts to convey interests of similar duration. In regard to leases for five years or less, and agreements to make such leases, all incidents of the seal likewise are dispensed with, except that a seal is still essential in order to maintain an action of covenant."

The Legal Effect of the Seal Upon Writings Purporting to Make Gifts of Personal Property and Upon Other Kinds of Contracts

As considered in a previous division of this discussion, the statutory thrusts at the life of the private seal in West Virginia have been confined principally to sealed instruments employed in real estate transactions. Let us look for a moment now at the situation with respect to personal property and, for purposes of this discussion, personalty will refer to tangibles — goods and chattels. Only one statute was found in this connection. The Revised Code of 1931 provides that "No seal shall be necessary to give validity to a gift of goods or chattels by writing . . . ." This sentence is contained in a section of the Code which also provides that "No gift of any goods or chattels shall be valid unless made by writing, signed by the donor or his agent, or by will, or unless actual possession shall have come to and remained with the donee or some person holding for or under him."

Prior to the revision of the Code in 1931 a statute provided that a gift of goods or chattels should be valid only if it were made either by deed or will, or unless there had been actual delivery of the property. This former statute apparently merely codified the prevailing common law in the Virginias. In Ross v.

of any covenant or warranty or other agreement therein contained, whether such instrument be sealed or unsealed, and every estoppel which would have been created by such writing, if sealed, shall be created by it, though it be unsealed. Such action of covenant may also be maintained upon any contract or agreement for the conveyance of any interest in land, which interest, if conveyed, would be required by said section one, article one of this chapter to be conveyed by deed."

"See Revisers' Note, supra n. 45.

"W. Va. Rev. Code (1931) c. 36, art. 1, § 5. The words "goods and chattels" within the meaning of this section include money, and every other kind of personal property, which may be the subject of gifts inter vivos or causa mortis. Dickeschied v. Exchange Bank, 23 W. Va. 340, 355 (1889)."

Ibid.

"W. Va. Code (Barnes, 1923) c. 71, § 1, " . . . No gift of any goods or chattels shall be valid, unless by deed, or will, or unless actual possession shall have come and remained with the donee, or some person claiming under him."
Milne\(^2\) we find the usual rule stated that a parol contract to pay a certain sum of money to a donee could not be enforced by the donee (certainly not in an action of debt, although the language used by the Court was broad enough to include an action of assumpsit as well) in the absence of either consideration, delivery, or the existence of an instrument under seal. The Court said, per Tucker, P. J.\(^3\):

"To give her (the donee) any right whatever, there must either have been an executed gift, or a valuable consideration. A gift without consideration confers a right, provided it is complete by delivery; and a grant, though incomplete, will confer a right if there be a valuable consideration. Thus, not only does a gift to a child, accompanied by possession, pass the title, but if one give chattels by deed, and deliver the deed to the use of the donee, though a volunteer, the goods and chattels are immediately in the donee . . . . For the deed is an executed contract; it passes all title out of the grantor, even without the delivery of possession."

Clearly then, in the light of the earlier statute and case law prevailing in West Virginia, the Revisers of the Code of 1931 had a direct purpose in providing that "No seal shall be necessary to give validity to a gift of goods or chattels by writing". As explained in the Revisers' Note to the section,\(^4\) the seal had become no longer necessary in order to give validity to a conveyance of land. "It would tend to confusion if a different and stricter requirement were retained for gifts of personal property than for conveyances of land." Consequently, the words "written instrument" were substituted for the word "deed" in the section in question.

When we notice types of sealed contracts other than those involving gifts of personal property we find — with few exceptions — slight statutory changes in West Virginia. One of these exceptions is the promissory note. The general common law rule was that a seal affixed to a negotiable note converted the note into a non-negotiable bond or specialty.\(^5\) This rule apparently pre-

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\(^2\) See Leigh (Va.) 204 (1841).
\(^3\) Ibid at 219.
\(^5\) Ex parte First Nat. Bank of Ozark, 212 Ala. 274, 103 So. 371 (1924) in which the Court said "Prior to the adoption in this state of the Uniform Negotiable Instruments Law . . . . this court had always recognized the distinctions impressed by the common law and the Statute of Anne on instruments given under seal, and though a promise to pay money were in the exact form of a negotiable promissory note, it was held that its execution
vailed in West Virginia. But at all events the adoption of the Negotiable Instruments Law in 1907 sounded the final knell to the seal as affecting the negotiability of the note to which it might be affixed. Seemingly, the only legal consequence in West Virginia that the affixing of a seal now has upon a negotiable instrument is to extend the period within which suit upon it can be brought.

Our study, therefore, has shown that vital statutory changes have been made in the case of sealed instruments falling within the following classes: (1) those employed in real estate transfers, as discussed previously, (2) those employed in transferring gifts of personal property, and (3) those within the meaning of the Negotiable Instruments Law. It is our belief that, except in the foregoing cases, the affixing of a seal to a paper carries with it in this State the same legal consequences as was the case prior to the legislation of 1921 and the subsequent clarification by the Revised Code of 1931. To this statement perhaps the following qualification should be added. Statutes have allowed certain defenses to sealed instruments at law which formerly were available only in equity. These defenses will be considered in the section of our study immediately following.

The Problem of Consideration in Contracts Under Seal

The problem of consideration in the case of sealed instruments long has been the subject of much discussion by legal scholars. This discussion for the most part has resulted from the use by the courts of the unfortunate expression, "a seal imports consideration". Clearly, such was not the theory of the early English common law. Private seals were used long before the action of assumpsit developed, with the resulting emphasis on the doctrine of consideration. But, as Professor Williston points out,

under the seal of the maker destroyed its character in law as a promissory note, and made of it an obligation legally different and distinct, a specialty, usually called a bill single or writing obligatory, carrying a conclusive presumption of a valid consideration for the obligation to pay, and not negotiable under the principles of the law merchant, or the provisions of the Statute of Anne, making promissory notes negotiable."

"Laidley's Adm'r v. Bright's Adm'r, 17 W. Va. 779 (1881); Keller, Adm'r v. McHuffman, supra n. 17.
"Ibid, art. 1, § 6 (d).
"Ibid, c. 55, art. 2, § 6. This section provides a ten year statute of limitations on contracts under seal. In Maslin's Exrs v. Hiett, 37 W. Va. 15, 16 S. E. 437 (1892) an action on a promissory note not under seal was held to be barred after five years.
"1 WILLISTON, CONTRACTS (1920) § 217.
"after the action of assumpsit had been developed, the somewhat unfortunate mode of expression became usual that a sealed instrument ‘imported’ a consideration. It would have been more accurate to have said that no consideration was needed for such a document. But, however expressed, the law always has been clear that apart from the changes made by statute, a sealed promise, whether absolute or in the form of an offer, is binding without consideration." Such certainly is the present trend of authority. The American Law Institute, for example, in its Restatement of Contracts says simply that a sealed contract does not need consideration.” Thus, once more we have a statement of the pure English common law on the point. It is the form of the instrument which places it entirely outside the category of those requiring the mystical element of consideration in order to be legally enforceable.

The West Virginia Supreme Court of Appeals has generally employed language to the effect that on the law side a seal “presumes” or “imports” a consideration. In Bolyard v. Bolyard,62 for example, the Court said, per Poffenbarger, J.:63

"As the instrument is under seal, a consideration is presumed . . . ."

And in National Valley Bank v. Houston,64 the Supreme Court, this time through Miller, J., observed that65

"In the first place, the contract being under seal, imported a consideration . . . ."

However, on the equity side, the Court has never recognized the presence of a seal as "importing" or dispensing with consideration. In Eclipse Oil Co. v. South Penn Oil Co. it was said:66

"The fourth contention of the plaintiff is that its lease is not a nūdum pactum, without consideration, and void by reason thereof. It insists that it is made under seal, which imports a consideration, and that a party to it cannot avoid it for this reason. This would be true at law . . . . It is not true in equity."

62 Contracts Restatement (Am. L. Inst. 1932) § 110: "It is not essential in order to make a promise under seal operative as a sealed contract that consideration be given for the promise."
63 79 W. Va. 554, 91 S. E. 529 (1917).
64 Ibid at 558.
65 Ibid at 348.
66 47 W. Va. 84, 98, 34 S. E. 923 (1899).
PRIVATE SEAL IN WEST VIRGINIA

Perhaps the best way to determine to what extent West Virginia has modified the pure English common law doctrine of consideration with respect to sealed instruments will be in noticing what matters of defense may be raised in a suit on such an instrument. Professor Ames points out that "the general rule that the misconduct of the obligee in procuring or enforcing a specialty obligation was no bar at common law upon the instrument was subject to one exception." That exception was duress. Even the defense of illegality was not permitted prior to 1767, unless the illegality appeared on the face of the instrument itself. Fraud in the procurement of the instrument could not be pleaded as a matter of defense in action on the instrument. Instead, the defendant was obliged either to pursue his independent action at law to recover the damage he had suffered by the fraud, or else seek to enjoin in equity an action on the instrument thus fraudulently procured. The defenses of payment and of accord and satisfaction were likewise originally unavailable in an action at law on a specialty. At first equitable intervention was allowed in such instances. Eventually a statute made such defenses valid at law. And finally, neither want of consideration, nor failure of consideration could be shown at common law.

Many of the foregoing rules have been changed by statute in West Virginia. The Revised Code of 1931 provides in part:

"In any action on a contract, the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement, ... or any other matter, as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or, if the contract be by deed, alleging any such matter existing before its execution, or any such mistake therein, or in the execution thereof, or any such other matter, as would entitle him to such relief in equity; ... ."

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67 Ames, Lectures on Legal History (1913) at 113.
68 Ibid at 107.
69 Wyche v. Macklin, 2 Rand. (Va.) 426 (1824); National Valley Bank v. Houston, supra n. 64 at 347.
70 Ames, op. cit. supra n. 67 at 106.
71 Ibid at 109-111.
72 Ibid.
74 C. 56, art. 5, § 8. (Code 1849, c. 172, § 5; Code 1860, c. 172, § 5; Code 1868, c. 126, § 5; Code 1923, c. 126, § 5).
As this division of our study is devoted to the matter of consideration in sealed instruments, it seems best to limit strictly our discussion of the foregoing statute to that problem. In *Fisher v. Burdett* the Supreme Court of Appeals held that the statute covered "contracts under seal as well as contracts by parol". Consequently it affirmed a judgment which allowed a defendant to file a plea alleging failure of the consideration stipulated in a contract under seal. However, this is as far as the Supreme Court of Appeals has gone in the direction of expanding common law principles by statutory interpretation. In *Williamson v. Cline* the Court refused to permit want of valuable consideration to be raised as a defense where the instrument sued on was under seal. In that case the Court said, per Brannon, J.:

"As just stated, failure of consideration may be shown under that statute as defense to a sealed instrument. Fisher v. Burdette, 21 W. Va. 626. We must, under that section ... draw the line of distinction between want of consideration and failure of consideration, as they are different. The words 'failure in the consideration', used in that section, refer to contracts where originally there was consideration subsequently failing, not to contracts wholly wanting consideration at their execution."

Thus, the Supreme Court of Appeals left the defense of want of consideration where it always has been in West Virginia — controlled by the principles of the common law. As we have seen, this means that a contract under seal does not require consideration to make it legally effective. And such is the real result reached by the West Virginia cases regardless of the fact that the Supreme Court of Appeals prefers to talk in terms of a seal "importing" or "presuming" a consideration.

**Conclusion**

In the introductory paragraph to this paper two important questions were raised, (1) what is the legal effect of the private seal in West Virginia, and (2) what need, for the private seal if any, still exists in the state?

We believe that our study substantiates the following answers to the first question:

(a) A seal attached to any instrument conveying or agreeing to convey any interest in land has no legal effect whatever.

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*21 W. Va. 626 (1883).*

*Supra* n. 73 at 205, 206.

*Ibid* at 206.
PRIVATE SEAL IN WEST VIRGINIA

(b) A seal attached to a lease of real estate for a term of more than five years, or to an agreement to make such a lease, has no legal effect whatever. A seal is still essential on a lease of real estate for five year or less, or on an agreement to make such a lease, if an action of covenant is to be maintained on the lease.

(c) A seal attached to a writing conveying goods or chattels by gift has no legal effect whatever.

(d) A seal attached to a negotiable promissory note has no legal effect whatever on the negotiable character of the instrument. Apparently the only legal effect resulting from the affixing of such a seal is to extend the period within which suit can be brought on the instrument.

(e) Except in the foregoing cases, a seal still possesses in West Virginia today its great common law incident — it is a substitute for consideration. And, while a statute permits the maker of a sealed instrument to show by way of defense that the consideration stipulated for in the instrument has failed, he is not permitted to show that valuable consideration was wholly wanting at the time the instrument was made.

Any answer to the second of the foregoing questions will depend to a decided degree on opinion. It is our opinion that there is great need for the private seal as a substitute for consideration in certain kinds of contracts. The following paragraph written by a legal scholar in our neighboring state of Pennsylvania," summarizes precisely our views in the matter:

"It is extremely useful to the community and to the legal profession to have an abracadabra by which a promise may be made legally binding without the uncertainty of proving consideration. In the absence of some magic token a creditor cannot release a liquidated, undisputed debt upon payment of less than is then due, despite the fact that it is frequently sound economic policy for him so to do. At the other end of the scale, perhaps, is the charitable subscription which is most conveniently substantiated by a seal. Not to mention those cases where there is grave doubt as to whether or not there is consideration for the agreement and here again the seal is a lifesaver to the hard-pressed lawyer . . . ."

Consequently, we suggest that the Legislature make no further inroads on the legal position of the private seal in West Virginia.

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